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The Equal Rights Amendment: Constraint on Discretion in Family Law

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THE EQUAL RIGHTS AMENDMENT: CONSTRAINT ON DISCRETION IN FAMILY LAW

INTRODUCTION

Society's ideas regarding acceptable feminine behavior are currently undergoing re-examination and revision.[1] One description of the traditional notion of appropriate feminine behavior states that it is

> based on the needs and values of the dominant group and dictated by what its members cherish in themselves and find convenient in subordinates: aggression, intelligence, force, and efficacy in the male; passivity, ignorance, docility, "virtue," and ineffectuality in the female. This is complemented by a second factor, sex role, which decrees a consonant and highly elaborate code of conduct, gesture and attitude for each sex. In terms of activity, sex role assigns domestic service and attendance upon infants to the female, the rest of human achievement, interest and ambition to the male.[2]

Despite growing evidence that such sexist norms and roles are often harmful and invalid,[3] an examination of the law in action reveals that legal institutions continue to perpetuate these presumptions.[4] A discriminatory effect is achieved most obviously by the enactment and enforcement of laws which make statutory distinctions based on sex.[5] However, even in the application of apparently sex-neutral laws, the role played by prevalent sexist attitudes in shaping the final outcome cannot be overlooked if sex discrimination is to be eliminated.

Administrative and judicial perceptions contribute significantly to official perpetuation of sex-specific roles and values. Any attempt to eliminate sex discrimination in the law must, therefore, look not only to the statutes, but to their application as well.

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1. *See generally* S. DE BEAUVOIR, THE SECOND SEX (1953); C. BIRD, BORN FEMALE (1971); B. FRIEDAN, THE FEMININE MYSTIQUE (paper ed. 1970); G. GREER, THE FEMALE EUNUCH (1971); K. MILLETT, SEXUAL POLITICS (1970).

2. K. MILLETT, SEXUAL POLITICS 26 (1970).

3. Weisstein, *'Kinder, Kuche, Kirche' As Scientific Law: Psychology Constructs the Female,* in SISTERHOOD IS POWERFUL 205 (R. Morgan ed. 1970).

4. *See* part II. *infra.*

5. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. (1971) [hereinafter cited as Brown].

While corrective action under the fourteenth amendment is certainly possible, that amendment has proved relatively ineffective in ameliorating sex discrimination.[6] Our focus here will be on the implications of the proposed Equal Rights Amendment[7] (ERA) for eliminating sexist criteria in both statutes and decision-making processes.

The proposed amendment reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.[8]

It is not our purpose here to discuss why the proposed ERA should be ratified, nor to discuss the history of the amendment.[9] Rather, we accept the basic proposition that in order to be consistent with the legislative history and intent of the amendment, sex must be a prohibited classification under the ERA.[10] A leading article interpreting the effect of the amendment states:

> The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of the society. That differentiation in treatment may rest upon particular characteristics or traits of the persons affected such as strength, intelligence, and the like. But under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait. Likewise the law may make different rules for some people than for

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6. *Id.* at 875-85 and sources cited therein.

7. U.S. CODE CONG. & AD. NEWS, 92d Cong., 1st Sess. 835 (1972). [The Equal Rights Amendment is hereinafter referred to as ERA.]

8. *Id.*

9. Brown, *supra* note 5. *See also Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. (1970) (hearings on the proposed ERA) [hereinafter cited as *1970 Hearings*].

10. Brown, *supra* note 5, at 892-93.

> others on the basis of the activity they are engaged in or the function they perform. But the fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular function does not allow the law to fix legal rights by virtue of membership in that sex. In short, sex is a prohibited classification.[11]

The statutory changes required by the ERA may be made either by legislative revision, through judicial interpretation, or through changes in agency laws and procedures. Brown, Emerson, Falk and Freedman, the authors referred to above, have described the types of statutory changes which will go far toward ending discrimination based on sex.[12] However, these more obvious alterations do not reach the sex-based criteria which are used by courts and administrative agencies in their decision-making processes.

It is our thesis that not only will the ERA make sex a prohibited classification, but also that under the ERA, administrative and judicial dispositions based on stereotyped sex-role norms, rather than on the individual's unique needs and capabilities, will be unconstitutional.[13] Moreover, even where application of a particular statute is not subject to direct constitutional challenge, careful examination must still be made of the assumptions which operate to produce results that may, *in toto,* have a discriminatory effect.

We do not claim that law is the only, or necessarily the primary, source of discrimination based on sex. In our view, sexist bias involves a circular process whereby society's values and prejudices are reflected in laws and official attitudes, which in turn perpetuate the bias.[14] The ERA is a device to interrupt that cycle by forbidding legal distinctions based on sex, both at the statutory and decisional levels.[15] Strong pres-

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11. *Id.* at 889.

12. *See generally id.* at 909-20.

13. For an excellent discussion of limitations on administrative discretion see Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement,* 72 COLUM. L. REV. 1295 (1972). *See also* K. DAVIS, DISCRETIONARY JUSTICE (1969).

14. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O. W. HOLMES, THE COMMON LAW 1 (1881).

15. There are some who feel that the law is helpless to effect change in this area. Mary Keyserling, former Director of the Women's Bureau of the United States Department of Labor, warned:

> The inequality of women does not arise out of constitutional defect—but rather out of economic, social, political, and legislative default. The

sures reinforcing the cycle of sexism will likely continue to operate on social attitudes and other societal institutions. But the changed attitudes which result from new legal perceptions may hasten the process of revising roles and statutes elsewhere.

This comment will demonstrate how sexist bias has crept into decision making in areas where the discretionary powers of both courts and agencies are very broad. In so doing, we will focus on three aspects of the New York Family Court Act: Persons in Need of Supervision (PINS) (article 7);[16] family offenses (article 8);[17] and the child protective law (article 10).[18] These statutes are appropriate for examination because they deal with women in three roles—teenager (PINS), wife (family offenses) and mother (child neglect).

Much speculative attention has been given to the impact the ERA may have on the family. One explanation for this concern may be that the family is often perceived to be the prime source of common values, taboos, and sex-role behavior. In addition, the maintenance of sex-specific behavior patterns seems, to many, to be necessary for the continuation of the family as it is presently constructed. We are not so persuaded. The Equal Rights Amendment will not coerce a particular pattern of behavior within private relationships, nor impose particular intrafamily arrangements. Rather, it will free family members and others from the present *legal* enforcement of relationships based on stereotyped conceptions of sex roles.

In considering the specific effect which the ERA might have on these statutes, we believe that it is both necessary and possible to eliminate discrimination based on sex, while still establishing and maintaining a proper balance among several, perhaps competing, interests. These interests include society's interest in the maintenance of stable socializing units[19] and the development of useful and responsible citi-

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amendment would not ameliorate the great mass of inequalities which confront us. Most of them are not rooted in laws which apply unequally but in custom, tradition and attitudes which the amendment could not touch.

1970 Hearings, supra note 9, at 155. However, we are persuaded that equal treatment under the law cannot be achieved unless those who apply the law are also free of sexist bias. To this extent, the ERA can "touch" and affect the inequality of women.

16. N.Y. FAMILY CT. ACT art. 7 (McKinney 1963).

17. *Id.* art. 8.

18. *Id.* art. 10 (McKinney Supp. 1972).

19. Both the New York Legislature and the courts have recognized this interest: "The State has a profound and continuing interest in preserving the family as the basic unit of society and in promoting the welfare of the home." Resolution passed by N.Y. Legislature setting up the Joint Legislative Committee on Matrimonial and Family Laws

zens; the adult's interest in self-actualization and the development of individual potential; and the child's need for dependable and loving care, stimulation, and an opportunity to grow.[20] Moreover, it should also be pointed out that when any group is repressed, society as a whole suffers from the loss of that group's full participation. Therefore, equality under the law remains equality within the context of democracy, where the rights of all individuals and groups are given equal consideration.

The aim of the amendment is that "differences in treatment under the law shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation."[21] In our view, equality should result in equal opportunity for *individual* choice and development, rather than in rigidly equal treatment or rigidly equal results. Both equal treatment and equal results go only part way toward constructive solutions.

Examination of the PINS, family offense and child protective laws reveals that two broad notions of acceptable feminine behavior are frequently applied to women in the family law area. These are: (1) notions concerning the feminine nature, which include expectations of docility, virtue, dependency and obedience; and (2) notions concerning proper feminine roles, including expectations regarding the procreative and nuturing function, homemaking and general domesticity. A similar examination of other areas of the law would undoubtedly yield additional statutes and decisions which reflect this stereotyped view of women.

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of the State of New York *quoted in* REPORT OF THE N.Y. JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS vi (1966).

> Marriage is more than a personal relation between a man and a woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State.

Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936).

20. We understand at last that children do not just grow. They need a great deal of care and stimulation in order to fulfill their intellectual and social potential. Much of the research which has been done on the early child's capacities and the older child's needs has brought home to many concerned child experts just how grievously we fail our children. Thus we witness the slow, quiet beginnings of the children's liberation movement, working against the false myth that America is a child-centered society.

S. CALLAHAN, THE WORKING MOTHER 11 (paper ed. 1972). *See also* B. BETTELHEIM, LOVE IS NOT ENOUGH (1950).

21. Brown, *supra* note 5, at 909.

In conclusion, we will suggest how the ERA might be utilized as a basis for corrective action in the family law area. Hopefully, these suggestions could be adapted as a means for eliminating sexist decision making in other areas of the law as well.

I. The Specific Statutes

Before examining the PINS, family offense and child protective laws to show how they have been applied, we will describe these statutes generally in order to acquaint the reader with their basic features.

A. *PINS Proceedings*

A Person in Need of Supervision (PINS) is defined as follows:

> a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority.[22]

The addition of PINS category by the 1962 Family Court Act was considered a reform by many since it gave the family court jurisdiction to help troubled juveniles, without placing the stigma of juvenile delinquency on children who had not committed a crime.[23] It was hoped that individualized rehabilitation programs could be developed for these children apart from those designed for juvenile delinquents.[24]

The purpose of establishing jurisdiction of the family court over noncriminal conduct of juveniles was to protect the children from the evils of their environment and their own immaturity.[25]

PINS petitions today are primarily brought against youths fourteen to sixteen years old[26] on grounds of habitual truancy (24% of all petitions in 1970–71), running away from home (23%), and refusal

22. N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1972).
23. N.Y. Family Ct. Act § 712(b) *Committee Comments* (McKinney 1963).
24. *See generally* 7 New York Joint Legislative Committee on Court Reorganization, Young Offenders and Court Reorganization (1963).
25. B. Rosenberg, Deviant Behavior of Adolescent Females: Perspectives and Alternatives, June 2, 1972 (unpublished paper at Yale Law School).
26. [1970-1971] N.Y. Judicial Conference Annual Report 356 (1972) [hereinafter cited as 1972 Judicial Conference].

to obey parents or guardians (22%).[27] Ten percent of the reasons assigned for PINS petitions in 1970–71 were based on acts constituting a crime or offense.[28]

A comparison of PINS petitions brought against young males and females show both age and offense differentiation based on sex. Until a recent case lowered the age limit of female PINS from eighteen to sixteen,[29] a substantial number of girls between those ages were brought to Family Court on PINS petitions.[30] Of course, no boys over sixteen could be PINS respondents under the statute.

Girls are more often charged with running away from home than are boys.[31] Girls are also charged with sexual misconduct under the PINS provisions, whereas boys are not.[32] In contrast, boys are brought to court on PINS petitions for acts which would constitute a crime or offense if committed by an adult far more often than are girls.[33]

While statistically the largest single group to initiate PINS petitions consists of parents,[34] school and police officials also commonly initiate them.[35] Generally, PINS petitions filed by the police and school authorities involve boys, while petitions involving girls are more frequently initiated by the respondent's parent or guardian.[36]

Petitions go through an intake procedure in which the probation service discusses the petition with those involved in an attempt to ad-

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27. *Id.*

28. *Id.*

29. A. v. City of New York, 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

30. In both 1969-70 and 1970-71, 25 percent of all girls brought to court on PINS petitions were between the ages of 16 and 18. 1972 JUDICIAL CONFERENCE 356.

31. *Id.* at 357.

32. "Sexual misconduct" was expressly given as the sole ground for a PINS petition in only a small percentage of cases involving girls in 1970-71. Sexual behavior, real or imagined, is often couched in other charges. In 1970-71, *no boys* in the entire state were charged with sexual misconduct. *Id.*

33. *Id.* Acts which would constitute a crime if committed by an adult may warrant an adjudication of juvenile delinquency. N.Y. FAMILY CT. ACT § 712(a) (McKinney 1963). As applied, statutory distinctions between male PINS and juvenile delinquents blur at many points. *See generally* N.Y. FAMILY CT. ACT art. 7 (McKinney 1963). The different types of behavior which are generally deemed to warrant punishment for girls and boys was also noted by the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 173 (1968).

34. In 1970-71, parents, relatives and guardians of respondents brought 59 percent of all PINS petitions. 1972 JUDICIAL CONFERENCE 357.

35. School authorities brought 22 percent of PINS petitions in 1970-71 and police brought 7 percent; the latter represented a marked decline from 13 percent in 1969-70. *Id.* For a list of persons who may originate PINS proceedings see N.Y. FAMILY CT. ACT § 733 (McKinney 1963).

36. 1972 JUDICIAL CONFERENCE 357.

just the case before proceeding to court.[37] The probation service cannot prevent any person who wishes to bring a petition from access to the court,[38] nor can it compel any person to "appear at any conference, produce any papers, or visit any place" during intake.[39]

Due process protection has been written into the PINS statute[40]—a respondent has the right to remain silent, to have counsel and to have a legal guardian[41] assigned by the court.[42] A respondent is entitled to an adjudicatory hearing, to determine if he committed the alleged acts,[43] and a dispositional hearing to determine whether he requires supervision or treatment.[44] If adjudged a PINS, the child may be placed in his own home, in the custody of a private person or authorized agency, or in a Division of Youth institution.[45] Successive placement extensions may be granted.[46] Probation, however, is the main dispositional remedy used by the court in these cases.[47]

B. *Family Offenses Proceedings*

The family offenses section of the New York Family Court Act[48] was established in order to provide a noncriminal forum in which to resolve family disputes, especially those which had gone beyond argument to "disorderly conduct, harassment, menacing, reckless endangerment, assaults, or attempted assault."[49] In the belief that complainants

37. N.Y. FAMILY CT. ACT § 734(a)(i)-(ii) (McKinney 1963).
38. *Id.* § 734(b).
39. *Id.* § 734(d).
40. This section states:

> The purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision . . . .

Id. § 711.
41. Law guardians are provided for in the N.Y. FAMILY CT. ACT §§ 241-49 (McKinney Supp. 1972).
Law guardians were included in the new Act

> based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.

Id. § 241.
42. *Id.* § 741(a) (McKinney 1963).
43. *Id.* § 742 (McKinney Supp. 1972).
44. *Id.* § 743 (McKinney 1963).
45. *Id.* § 756(a) (McKinney Supp. 1972).
46. *Id.* § 756(b), (c) (McKinney 1963).
47. In 1970-71, probation was ordered in 59 percent of all cases in New York in which a PINS adjudication was made. 1972 JUDICIAL CONFERENCE 362.
48. N.Y. FAMILY CT. ACT art. 8 (McKinney 1963).
49. *Id.* § 811 (McKinney Supp. 1972).

> In the past, wives and other members of the family who suffered from

sought "not to secure a criminal conviction and punishment, but practical help,"[50] the legislature provided for jurisdiction over all such complaints "between spouses, or between members of the same family or household."[51] It was left to the courts to define family or household on a case by case basis.[52]

Despite some earlier uncertainty concerning the extent of the court's jurisdiction over acts characterized as felonies, it is now well settled that even in the case of a serious assault, "a family offense does not become an indictable crime until the family court judge so decides."[53] The New York Court of Appeals has further limited family court jurisdiction to "relationships *only* where there is legal interdependence, either through a solemnized marriage or a recognized common-law union."[54]

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disorderly conduct, harassment, menancing, reckless endangerment, assaults, or attempted assaults by other members of the family or household were compelled to bring a "criminal charge" to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction or punishment, but practical help.

The family court is better equipped to render such help, and the purpose of this article is to create a civil proceeding for dealing with such cases. It authorizes the family court to enter orders of protection and support and contemplates conciliation procedures. If the family court concludes that these processes are inappropriate in a particular case, it is authorized to transfer the proceeding to an appropriate criminal court.

Id.

50. *Id.*

51. The family court has *exclusive original jurisdiction,* subject to the provisions of section eight hundred thirteen [governing transfers from criminal court], over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment, an assault or an attempt [*sic*] assault between spouses or between parent and child or between members of the same family or household.

Id. § 812 (emphasis added). *See also* Parnas, *Judicial Response to Intra-Family Violence,* 54 MINN. L. REV. 585, 623-25 (1970), where the author discusses the importance of Manhattan's successful "Home Term," a special court established in 1946 to handle the rising incidence of intra-family violence, as a precedent for the inclusion of a family offenses section in New York's Family Court Act.

52. N.Y. FAMILY CT. ACT § 812 *Committee Comments* (McKinney 1963).

53. Note, *Jurisdiction Over Intra-Family Offenses: A Plea for Legislative Action,* 45 N.Y.U.L. REV. 345 (1970). *See* People v. Johnson, 20 N.Y.2d 220, 229 N.E.2d 180, 282 N.Y.S.2d 481, *rev'g* 27 App. Div. 2d 547, 275 N.Y.S.2d 469 (2d Dep't 1966).

54. People v. Allen, 27 N.Y.2d 108, 113, 261 N.E.2d 637, 641, 313 N.Y.S.2d 719, 722 (1970) (emphasis added).

Certainly making available conciliation procedures, as contemplated by the Family Court Act, to such informal and illicit relationships as those before us, would clearly be contrary to public policy by conferring the privileges of Family Court Services to a relationship which the Legislature has chosen not to recognize.

Id. at 112-13, 261 N.E.2d at 640, 313 N.Y.S.2d at 723. *See also* N.Y. DOM. REL. LAW § 11 (McKinney 1964).

In 1971 over 80 percent of the family offense petitions were filed by wives (apparently against their husbands).[55] More than two-thirds of the complaints alleged assault, half of which were accompanied by injury.[56] The remaining complaints were for harassment, menacing, disorderly conduct and other less serious offenses.

Most family offense complainants confer initially with the probation department's intake service where an attempt is made to settle the problem through informal counselling and adjustment in lieu of formally petitioning the court.[57] In 1971, nearly one half of the complaints were settled in this manner.[58] Of those that remained, 22 percent were withdrawn and 30 percent were dismissed.[59] Most of the cases which proceeded to court were disposed of by the issuance of orders of protection.[60] Court sponsored conciliation[61] or transfer of the

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55. 1972 JUDICIAL CONFERENCE 371.

56. *Id.*

57. N.Y. FAMILY CT. ACT § 823(a)(ii) (McKinney 1963).

58. In Erie County in 1971, only 1,916 cases out of 4,596 adult complaints were referred to the petition clerk, 1,658 were adjusted at intake, and 483 were referred to community agencies. Interview with Mark J. Magavro, Assistant Supervisor of Intake, Erie County Department of Probation, in Buffalo, N. Y., Nov. 14, 1972.

59. 1972 JUDICIAL CONFERENCE 371.

60. *Id.* N.Y. FAMILY CT. ACT § 828 (McKinney Supp. 1972) provides for the issuance of temporary orders of protection where necessary. The revised rules of the Family Court (thru July 2, 1972) define the relevant terms and conditions of an order of protection as follows:

> (a) Upon the conclusion of a dispositional hearing on a petition under Article 8 of the Act, the Court, in accordance with Section 841 of the Act, may enter an order of disposition suspending judgment for a period not in excess of six months, an order placing the respondent on probation for a period not exceeding one year, or an order of protection, upon any one or more of the following terms and conditions which may require the petitioner or respondent, or both, to:
>
> (1) stay away from home, the other spouse, or the child;
>
> (2) permit a parent to visit the child at stated periods;
>
> (3) abstain from offensive conduct against the child, against the other parent or other members of the same family or household, or against any person to whom custody of the child is awarded;
>
> (4) give proper attention to the care of the home;
>
> (5) refrain from acts of commission or omission that tend to make the home not a proper place for the child;
>
> (6) notify the Court or probation service immediately of any change of residence or employment;
>
> (7) cooperate in seeking and accepting medical and/or psychiatric diagnosis and treatment, including family case work or child guidance for himself, his family or child.

N.Y. COURT RULES § 2507.3 (McKinney 1972).

61. N.Y. FAMILY CT. ACT art. 9 (McKinney 1963).

case to criminal court[62] are other alternatives. However, they are seldom used.[63]

Viewed overall, the main purpose of the Family Court Act is to aid in the preservation of the family unit.[64] Maintenance of a home life that nurtures the personal development and well-being of all its members, adults as well as children, is important to the achievement of that objective. The family offenses provisions of the law are an important part of the court's response to trouble in this area, and should be examined closely to determine whether the law is satisfactorily fulfilling its purpose.

C. *Child Protective Proceedings*

The purpose of the neglect statute is to provide due process in situations where the state wants to intervene, against the wishes of the parent(s), to protect a child's physical, mental, and emotional well-being.[65] Article 10 of the New York Family Court Act, enacted in 1970, deals with both child abuse[66] and neglect,[67] under the title

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62. *Id.* § 816 (McKinney Supp. 1972).

63. In 1970-71 only one hundred formal conciliation proceedings were disposed of—twenty-four were referred from family offense proceedings. A bare 3 percent of all conciliation proceedings were actually completed. 1972 JUDICIAL CONFERENCE 372, 374. Only 2 percent of family offense petitions were transferred to criminal court. *Id.* at 371.

64. N.Y. CONST. art. VI, § 13 (McKinney 1962).

65. N.Y. FAMILY CT. ACT § 1011 (McKinney Supp. 1972).

66.

> "Abused child" means a child less than sixteen years of age whose parent or other person legally responsible for his care
>
> (i) inflicts or allows to be inflicted upon such child . . . or
>
> (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ . . . .

Id. § 1012(e).

67.

> "Neglected child" means a child less than eighteen years of age
>
> (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care
>
> (A) in supplying the child with adequate food, clothing, shelter, or education . . .
>
> (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . .

Id. § 1012(f).

"Child Protective Proceedings." In the statutory definition of abuse, the emphasis is on the idea of physical injury to the child; the definition of neglect focuses on the concept of failure "to exercise a minimum degree of care." The broadness of these definitions, although providing necessary flexibility, has the effect of forcing the court to deal in an extra-legal framework.[68] It is thus compelled to decide not so much whether an act was committed, but whether a person is an adequate parent. The lack of knowledge about what actually constitutes "adequate parenting," indicated by the plethora of child care books on the market today, makes this question almost impossible to answer even for specialists in the field, let alone judges whose expertise lies elsewhere.

The overwhelming majority of neglect actions are brought against women. In 14 percent of the almost 8,000 actions brought under article 10 during the judicial year 1970–71, only the father was named as a respondent, while in 56 percent of these cases only the mother was named.[69] Moreover, despite the wide range of possible petitioners,[70] public social service agencies initiated over half the neglect petitions brought in New York State, excluding New York City.[71]

Procedurally, article 10, like PINS and family offense provisions, provides for both a fact-finding[72] and a dispositional hearing.[73] In theory, the fact-finding hearing permits the court to concentrate on establishing the existence of the actual conduct constituting neglect.

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68. A study of the dispositions in child neglect cases brought to court by social workers indicates:

> Clear and present danger to the safety and well-being of children was the principal factor influencing a court decision to remove children from the care of their parents. Evidence of physical abuse or malnutrition, documented evidence of inadequate child care, and police intervention on behalf of neglected children were associated with court action that led to separation of children and parents. On the other hand, psychodynamically based predictions of adverse future emotional development of children resting on casework inferences derived from parental character problems or inadequacies were inversely related to court decisions resulting in placement.

Weinberger & Smith, *The Disposition of Child Neglect Cases Referred by Caseworkers to a Juvenile Court,* in CHILD WELFARE SERVICES: A SOURCEBOOK 46 (A. Kadushin ed. 1970).

69. 1972 JUDICIAL CONFERENCE 352. In 28 percent of the proceedings both parents were named as respondents. *Id.*

70. N.Y. FAMILY CT. ACT § 1032 (McKinney Supp. 1972).

71. 1972 JUDICIAL CONFERENCE 352.

72. N.Y. FAMILY CT. ACT § 1044 (McKinney Supp. 1972).

73. *Id.* § 1045.

If neglect is established, the court can, at the dispositional stage, inquire more deeply into the nature of the parent-child relationship. For this reason, probation and other reports cannot be furnished to the court until after the completion of the fact-finding hearing.[74]

The child protective statute provides the court with a wide range of possible alternatives for the disposition of neglect cases.[75] At one end of the dispositional spectrum is the option of releasing the child to the custody of the parent;[76] at the other end is placement of the child,[77] which generally means that custody of the child is granted to a department of social services. Statewide, 47 percent of the cases are withdrawn or dismissed.[78] Throughout the state, 20 percent of the petitions resulted in placement with some private or public social service agency.[79] The child was released to the parent without supervision of any kind in only 6 percent of the cases. In the bulk of the remainder of the cases, the child was placed in the custody of the parents, with some sort of agency supervision.[80] Placement with a department of social services generally means that a child lives in a foster home.

II. Examination of the Statutes Under the ERA: Sex-Role Bias Uncovered

The claim that the ERA can be used to challenge sex-role bias in decision making is meaningless, unless it can be proven that statutes which are not necessarily biased on their face have, in fact, been *applied* in a discriminatory way. In this section, we will discuss how notions concerning feminine nature and appropriate feminine role have been determinative in the application of these statutes to females.

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74. *Id.* § 1047(b). For a discussion of the use of psychiatric evaluations as evidence in neglect proceedings see *In re* Blaine, 54 Misc. 2d 248, 282 N.Y.S.2d 359 (Fam. Ct. 1967).

75. N.Y. Family Ct. Act § 1052 (McKinney Supp. 1972).

76. *Id.* § 1054.

77. *Id.* § 1055. The initial period for such placements is 18 months. The court may make successive one-year extensions of placement upon a hearing. *Id.* § 1055(b). "Any interested person" may petition the court for termination of placement. *Id.* § 1062.

78. 1972 Judicial Conference 353.

79. *Id.*

80. *Id.*

A. *PINS*

It is widely agreed that the PINS classification generally serves as a morality statute for females.[81] It is virtually never used to discourage the same type of behavior in males. Rather, it provides a procedure under which males who commit minor acts of delinquency can avoid the stigma of juvenile delinquency. This interpretation of the statute is supported by statistics of the kinds of offenses alleged on PINS petitions brought against girls and boys.[82]

Because the grounds for PINS petitions are so broad, the meaning of specific allegations is often unclear. For example, most PINS petitions charge "ungovernability,"[83] which in the case of a girl often means that she is suspected of engaging in sexual behavior.[84] Although studies indicate that the rate of sexual activity among young men today is much higher than among young women,[85] young men are rarely prosecuted for these offenses. Petitions against males which allege "ungovernability" often later specify aggressive acts against others.[86]

The reason for this differentiation appears to be that a girl who engages in sex violates a role definition which applies only to females. This may be a result of an unstated fear or dislike of sexual activity in women.[87] Women are often seen as temptresses who lure men into immoral acts.[88] For example, in a study of 1500 juvenile cases, one judge refused to treat *any* form of sexual behavior in boys with more than probation because he felt that girls were the cause of their conduct.[89]

In fact, when adolescent girls do engage in sexual activity, that behavior may spring from needs and desires wholly apart from a sex drive itself.[90] A girl may engage in sex to offset real or imagined inade-

81. Gold, *Equal Protection for Juvenile Girls in Need of Supervision in New York State,* 2 N.Y.L.F. 570 (1971) [hereinafter cited as Gold]; B. Rosenberg, *supra* note 25.

82. *See generally* notes 26-33 *supra* and accompanying text.

83. *See, e.g.,* 1971 N.Y.S. [ERIE COUNTY] FAMILY COURT ANNUAL REPORT 9-10.

84. Gold, *supra* note 81.

85. Short & Ivan, *Extent of Unrecorded Juvenile Delinquency: Tentative Conclusions,* in SOCIETY, DELINQUENCY, AND DELINQUENT BEHAVIOR 58 (H. Voss ed. 1970).

86. *See generally* Gold, *supra* note 81.

87. *See generally* M. SHERFEY, THE NATURE AND EVOLUTION OF FEMALE SEXUALITY (1972).

88. *See, e.g.,* H. HAYS, THE DANGEROUS SEX (paper ed. 1972).

89. B. Rosenberg, *supra* note 25, at 75.

90. G. KNOPKA, THE ADOLESCENT GIRL IN CONFLICT 82 (1966).

quacies. Many female teenagers are unsure of their femininity and afraid they will not be able to fulfill society's expectations of them as women.[91] Sex may also be used to gain acceptance and love by girls who feel rejected by their families and/or peers.[92] On the other hand, sexual involvement may be a result of the normal need for social power which can only be acquired by adolescent girls through sexual rewards or the promise of those rewards.[93] The highly publicized "sexual revolution" may exert pressure on girls to engage in sex, either to be popular, or simply to be like others of their age.[94] The irony of the changing morality is that a girl may be coerced into sex by social pressure, then condemned as promiscuous for engaging in that sexual activity.

The condemnation of girls for engaging in activity which is relatively acceptable for boys is consistent with the notion that young women, like children, need special protection and care.[95] This special care is often exhibited by the law through a closer scrutiny of their behavior,[96] and through longer rehabilitation periods, when that conduct is found wanting.[97]

It should be stressed that assertive or sexual behavior in adolescent girls is not necessarily bad. Aggressive and sexual activity is considered the norm, or perhaps the goal, of many men in our society. Energy, enterprise and rebelliousness—traits often condemned in a girl[98]—are apt to be praised in a boy. An aggressive girl, then, is not necessarily violating the norm of *people* in our society; she is defying the role established for girls and women.

When women break out of the role of docility and virtue as-

91. C. VEDDER & D. SOMERVILLE, THE DELINQUENT GIRL 71 (1970).

92. *Id.* at 112-13.

93. Marwell, *Adolescent Powerlessness and Delinquent Behavior,* 14 SOC. PROB. 35, 43-44 (1966).

94. Cottle, *The Sexual Revolution and the Young,* N.Y. Times, Nov. 26, 1972, § 6 (Magazine), at 37.

95. Strouse, *To Be Minor and Female: The Legal Rights of Women Under 21,* 1 Ms., Aug., 1972, at 70.

96. Many states have laws similar to the N.Y. PINS statute, which operate as morality statute for females. *See* B. Rosenberg, *supra* note 25; Note, *California's Predelinquency Statute: A Case Study and Suggested Alternatives,* 60 CALIF. L. REV. 1163 (1972); Comment, *Juvenile Court Jurisdiction over "Immoral" Youth in California,* 24 STAN. L. REV. 568 (1972).

97. For cases striking down longer sentences for women who committed offenses which result in shorter sentences for men see United States *ex rel.* Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniels, 430 Pa. 640, 243 A.2d 400 (1968).

98. *See generally* J. COWIE, V. COWIE & E. SLATTER, DELINQUENCY IN GIRLS 169 (1968); G. KNOPKA, *supra* note 90; C. VEDDER & D. SOMERVILLE, *supra* note 91.

signed to them, the law intervenes to protect not only the girl involved, but the future offspring which her role requires her to produce.

> [w]ith the aggressive and retaliatory use of her body and her reproductive functions, the delinquent girl deeply violates the protective and caring attributes of her maternal role. This remains a foreboding defect that will harm not only her but her offspring in the future. The ultimate goal in the treatment of the delinquent girl should be her attainment of the capacity to become a good mother. Only then can we break the chain that perpetuates deviant development and maladaption throughout the generations.[99]

While the traditional female role may not be inherently negative, not all females can or want to conform to it. Should girls whose only "crime" is to break the stereotypic female pattern be forced into that model by the PINS law? We submit that they should not. A broader definition of the female role must be accepted and encouraged by the court, in its adjudication and disposition of female PINS, in order to be consistent with the ERA.

B. *Family Offense*

Unlike the situations involving PINS and child protective proceedings, where court action often is initiated by state authorities or social agencies, family offense proceedings are usually brought by an aggrieved family member. The respondent is most often the husband-father.[100] Since the state is not acting in a coercive way, therefore, it is harder to apply the mandate of the ERA to decisions resulting from such court action. This is especially true since the family offense law cannot be considered discriminatory on its face. Except for several references to "wives," "she" and "her," which would presumably have to be removed, the law is equally applicable and available to all family members. However, the fact that women are the predominant family complainants[101] seems to indicate the existence of serious frustrations, which increase the incidence of intrafamily violence adversely affecting women, and which drive them to seek help.[102] Once the court has

99. Blos, *Three Typical Constellations in Female Delinquency*, in FAMILY DYNAMICS AND FEMALE SEXUAL DELINQUENCY 109 (O. Pollack & S. Friedman eds. 1969).

100. *See* note 55 *supra* and accompanying text.

101. *Id.*

102. In addition, it may be that the growing demand by women for greater rights and opportunities coupled with more self assertiveness and independence in interpersonal relations will, in the short run at least, produce heightened inter-sexual conflict.

jurisdiction over the situation, it is important to discover whether it has gone beyond stopgap measures, to provide truly effective help in relieving the pressures that have brought the family to crisis. This is the point at which officials' attitudes toward women become important.

To some extent the court does help to relieve immediate pressures. In instances where the petitioner and respondent want aid in reestablishing a traditional patriarchal family structure, complete with performance of traditional male and female roles, the court may be helpful as a source of outside authority. But where violence is, in reality, the result of deep frustrations over roles, jobs, aspirations, and psychological needs, the court may not offer adequate help. There are two reasons for this failure: many potential complainants are discouraged from pursuing legal remedies; those who do get to court may fail to obtain the necessary help because of the attitudes of the personnel assigned to assist them.

Fully one-half of the family offense complaints made are withdrawn or dismissed.[103] This suggests that the complaints are exaggerated; the problems are not readily justiciable; or there is a great deal of female resignation or masochism, fear, social pressure or binding obligations to other family members operating to help keep the peace. Undoubtedly, all three of these factors are operative, but the third is more important than is generally realized.[104] The prevalence of police non-arrest policies in domestic disturbances,[105] while valid in many ways, often frustrates the woman's desire to obtain help. A summary of the reasons for one such non-arrest policy shows that police are reluctant to interfere, not only because to do so may be dangerous to the officer, or may escalate an otherwise temporary altercation, but because

> [p]olicemen (as well as judges and prosecutors) have had similar experiences in their own homes and tend to feel that "a man's home is his castle."[106]

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103. 1972 JUDICIAL CONFERENCE, *supra* note 26, at 361.

104. *See* Kurland, Morgenstern & Sheets, *A Comparative Study of Wife Murderers Admitted to a State Psychiatric Hospital,* 1 J. SOC. THERAPY 7, 10-11 (1955) for a discussion of the characteristics and behavior techniques of the wives who stayed with violent men until their attacks became homocidal.

105. *See* Parnas, *The Police Response to the Domestic Disturbance,* 1967 WIS. L. REV. 914, 930-31.

106. *Id.*

> By definition, the domestic disturbance contains two elements. First, it is usually a relatively minor conflict. If a criminal violation is involved, it is

It is also important to note that a preference for mediation may unjustly minimize the seriousness of the husband's assaults.[107] It may also discourage a wife from seeking a real solution through agency-sponsored conciliation where she frequently must keep her determination and motivation high through several referrals, delays and red tape.[108]

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generally not more than disorderly conduct or a simple assault or battery. Second, the conflict is always between relatives or others living in family-like intimacy. This combination of elements—the minor nature of the offense and the relationship between the parties—results in several very practical reasons for a nonarrest policy:

a. The victim frequently does not want the offender arrested but may call the police to:
   (1) Scare the offender into behaving himself;
   (2) Get the offender out of the house for awhile;
   (3) Use the future threat of arrest for her benefit; or
   (4) Take the victim to the hospital.
b. The victim may not be able to afford having the offender arrested if it results in the loss of his job or temporary loss of support.
c. The offense may be thought to be conduct which is acceptable to the culture of the disputants and therefore not seriously objectionable to the victim.
d. The offender, angered by his arrest, may cause more serious harm to to the victim upon his return to the family home.
e. Arrest may cause a temporary or permanent termination of a family relationship or harm innocent family members.
f. The victim quite frequently changes her mind about arrest or prosecution after she has had time to cool off, as exemplified by the fact that:
   (1) Victims seldom secure warrants when advised to do so.
   (2) Victims frequently indicate to the judge at trial that they do not wish to prosecute.
g. There is reticence in the issuance of warrants and prosecution of such cases by the prosecuting authorities.
h. The court summarily dismisses disorderly charges stemming from domestic disturbances when the victim-complainant chooses not to prosecute.
i. The court is lenient in sentencing.
j. Policemen (as well as judges and prosecutors) have had similar experiences in their own homes and tend to feel that " a man's home is his castle."

Id. (citations omitted). In connection with "c" in that list of reasons, consider the following example given by Parnas: "[A] Puerto Rican woman, when asked by the judge, 'should I give him thirty days?' replied, 'No, he is my husband, he is supposed to beat me.' " *Id.* at 952.

107. Truniger, *Marital Violence: The Legal Solution,* 23 HASTINGS L.J. 259, 272 (1971).

108. With reference to the Chicago Court of Domestic Relations' Social Service Department, Parnas believes that many persons referred there probably don't follow through:

> Those who overcome their initial ignorance, inertia, fear or hostility, and do come in, most likely have a better chance of being helped than the others anyway. Thus, in a sense, a natural screening process has already taken place. Furthermore, one can reasonably assume that a great many of those who make

Even where the petitioner does overcome inertia or discouragement, and follows through on her complaint, the adequacy of the help rendered may depend upon the attitudes that she encounters. The limited remedies employed to deal with family offense complaints suggest the court's limited scope of concern. Thus, it is significant that nearly all of the cases which actually come to litigation are resolved by a court order of protection.[109] If the family problem arose in part because of basic role frustrations, this solution is a poor one at best. In a family offense case, a woman is viewed as having primarily one legitimate complaint—physical abuse. Other complaints, such as frustration or humiliation, are given minimal attention, though they too may eventually erode the marriage or escalate into violence. Observation of family offense proceedings bears this out. In one case, for example, the wife complained that her husband frequently refused to give her any household money. Instead, he did the marketing, deliberately omitting items that she needed and had requested. He also ridiculed her, shoved her around and threw her possessions down the stairs. Since she was being financially supported and had not suffered serious physical harm, the court found it difficult to understand her complaint. In fact, the judge made what appeared to be a condescending and superficial summary of the allegations, thereby revealing his insensitivity to problems which were undoubtedly quite real to the complainant.[110] When given an opportunity to respond, the wife appeared flushed and remained silent.[111] Even if granted, orders of protection and support would do little to solve the basic problem in this type of case unless, perhaps, the court order included reference to the maintenance of a home life conducive to the health and welfare of *all* its members. At present the emphasis is on protection from physical abuse, and on maintenance of a proper home for a child.[112]

In addition, inquiry ought to focus upon the standards for adjustment that are used in encouraging parties to harmonize their relationship. When the new Family Court Act was passed in 1962, the Director and Deputy Director of the Office of Probation for the Courts

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contact initially, only to be referred elsewhere, will not undertake the effort a second time, particularly since they may view their original effort as fruitless. Parnas, *supra* note 51, at 591.

109. 1972 JUDICIAL CONFERENCE, *supra* note 26, at 371.

110. Case observed in Erie County Family Court, November, 1972.

111. *Id.*

112. *See* terms of the order of protection at note 60 *supra.*

of New York City coauthored an article,[113] praising the Act's provisions to ensure that intake procedures would have more adequate procedural safeguards than did previous programs. They cautioned, however, that

> [t]he success of probation in implementing intake will depend not only upon the asignment of skilled staff but also upon the training in case selection which is given to the staff involved. Lacking necessary objective criteria, individual staff members may develop their own *subjective criteria.* When this occurs, the basic criterion may be the nature of the act alleged and its significance to that officer.[114]

In Erie County there are no training manuals establishing objective, evaluative criteria for those probation officers dealing with family offense cases.[115] Thus no examination to reveal discriminatory attitudes can be made. In the absence of such manuals, it is likely that the "subjective criteria" mentioned above are, in the case of women complainants, all too often characterized by traditional sexist norms and expectations. It may be difficult to prove that these attitudes are operative, but it is precisely at this stage that the pressure to conform to traditional roles may be greatest. Under the ERA, this kind of pressure would be impermissible.

Since conflicts are considered resolved when the parties themselves so decide, it is easy to say that the woman herself determines the outcome. Certainly the emphasisis on voluntary utilization of court and counselling facilities is desirable, but we cannot overlook the importance of the persuasive role played by the intake officer. Therefore, even where the participants presumably decide their own disputes, *awareness by counsellors of the kinds of problems women may be facing, particularily in their traditional role as housewife, is essential.* In a recent book, sociologist Dr. Jessie Bernard elaborates on the theory that

> it is the role of housewife rather than the fact of being married which contributes heavily to the poor mental and emotional health of wives. . . . [T]he working women are overwhelmingly better off. In

113. Wallace & Brennan, *Intake and the Family Court,* 12 BUFFALO L. REV. 442 (1963).

114. *Id.* at 449 (emphasis added).

115. Interviews with Charles L. Hutchinson, Director of Erie County Department of Probation and Mark J. Magavro, Assistant Supervisor of Intake, in Buffalo, N. Y., Nov. 14, 1972.

> terms of the number of people involved, the housewife syndrome might well be viewed as Public Health Problem Number One. Ironically, the woman suffering from it is not likely to elicit much sympathy.[116]

If counsellors, judges and court personnel acquire insight into the real problems which underlie many family offense complaints, their guidance may go far toward breaking the aforementioned cycle of sex-role presumptions which, at present, the court often perpetuates. Hopefully the ERA can exert pressure toward hastening this change by spotlighting the issue of classification based on sex. Though instances of judicial reliance upon sexist presumptions may be especially hard to document in the family offenses area, where such instances occur, the ERA should provide a constitutional basis for challenging the discriminatory result.

C. *Child Protection*

Examination of article 10 of the Family Court Act reveals that the law has been used to enforce a particular standard of morality on women, where the same standard would not be required of men.[117] In addition, pressure, both internal and external, to conform to the sex-role stereotype of "mother," can lead to the kind of frustration and despair which is typical of the neglecting parent's mental attitude.

The primary consideration in neglect cases should be the relationship between the parent's conduct and the well-being of the child. As one court has said, "[n]eglect statutes are concerned with parental behavior only and solely as it adversely affects the child . . . ."[118] In other words, "[b]ehavior cannot be deemed 'neglectful' in and of itself, but only as it affects the child."[119] In light of this, it is interesting to consider how some courts evaluate the evidence on the issue of neglect.

In situations where the mother's alleged promiscuity is at issue, the courts seem to have a tendency, on occasion, to lose sight of the children in their consideration of the mother's behavior. Nor do they seem overly concerned with making a comparison of the father's behavior with that of the mother, even in situations where the neglect

116. J. Bernard, *Marriage: His and Hers,* 1 Ms., Dec., 1972, at 46.

117. The greater frequency of enforcement against women is suggested by the statistics cited in the text at note 70 *supra.*

118. *In re* H. Children, 65 Misc. 2d 187, 317 N.Y.S.2d 535 (Fam. Ct. 1970).

119. S. KATZ, WHEN PARENTS FAIL 64 (1971).

proceeding is actually a custody contest between the parents. For example, in *In re Tesch*[120] the petitioner father and the respondent mother were living apart, but had no decree of separation or divorce. The father had brought a neglect action to terminate the mother's custody of the two children of the marriage. Apparently there were no allegations that the mother was not caring for the children; in fact the court admitted that "there is little doubt of this mother's love"[121] for her children. Nor were there any allegations that the needs of the children were not being adequately provided for. In making its determination that the mother was neglectful, the court considered the following situation as apparently the only specific instance of neglect:

> In the early part of March, the two children were taken by their mother to a dancing class in the afternoon. Eventually they were picked up by their father the next day, having spent the night with the dancing instructor. Because of a particularly heavy storm on that date, the Court feels that the better part of valor was to leave the children in good hands until the roads were cleared. However, the respondent admitted that she was with her boyfriend during all that time.[122]

Thus, while the court admitted that the mother's conduct in regard to children's welfare was wise, it nevertheless focused on behavior which could have in no way affected the children. Unless the mother were to be marked with a scarlet A, it seems unlikely that the children would ever know where she had been. In a situation such as this, it is unnecessary to consider the possible effect of such knowledge on the children.

The court did not even consider the conduct of the father in awarding him custody of the children. That the father loved, and was able to provide for the children, was sufficient assurance of his ability to adequately care for the children. Only in the case of the mother did the court add a requirement of some standard of morality as a condition for retaining custody.

The *Tesch* court permitted the mother visitation rights, but only on the condition that she "not have visitation at any time when she is in the company of or entertaining male companions, to whom she is not married."[123] Not only did the court not see fit to similarly insulate the

120. 66 Misc. 2d 900, 322 N.Y.S.2d 538 (Fam. Ct. 1971).
121. *Id.* at 902, 322 N.Y.S.2d at 540.
122. *Id.* at 901, 322 N.Y.S.2d at 539.
123. *Id.* at 903, 322 N.Y.S.2d at 541.

children from this aspect of their father's life, it also appears to have disregarded the needs of the children in its eagerness to enforce a particular standard of morality upon the mother. Because of this restriction, the children would have no opportunity to become acquainted with their mother's prospective husband. They would thus be denied the chance to gradually adjust to a new stepfather. This kind of decisional bias should be unacceptable under the Equal Rights Amendment.

The court also exhibited more concern with the mother's behavior than with its effect on the children in *In re H Children.*[124] Here, as in *Tesch,* the court seemed to find neglect solely because the mother was living with a man to whom she was not married. The respondent mother's statement that "her paramour is supporting the household and that he is very good to the children, so much so, that they are doing much better in school and are no longer truant,"[125] was not refuted by any allegations to the contrary. In addition, the court specifically declined to evaluate the conduct of the petitioner father, saying only that "[n]ot at issue in this proceeding is the fact that respondent may very well have been justified in removing herself and their children from petitioner's home because of alleged misconduct on part of the petitioner."[126] The court, in finding neglect, warned that "the sins of the mother are being visited upon the children," and asked:

> Who can deny that the children here, more particularly the ones who have reached the impressionable ages of 13 and 12, do not now or might not in the immediate future suffer detrimental damage attributable to the adulterous act of their mother.[127]

If stated in realistic rather than moralistic terms, the issue is quite different. Respondent, whose departure from the marital home even the court admitted might have been justified, had found a man who was willing to support her and the five children, and even to marry her. To the extent that external standards are accurate gauges, the children were also happier in this situation. Nevertheless, the court was apparently willing to risk separation of the children into different foster homes and the permanent disruption of family ties only because

124. 65 Misc. 2d 187, 317 N.Y.S.2d 535 (Fam. Ct. 1970).
125. *Id.* at 188, 317 N.Y.S.2d at 536.
126. *Id.* at 187-88, 317 N.Y.S.2d at 536.
127. *Id.* at 189, 317 N.Y.S.2d at 537-38.

it is "improper" for a mother to live with a man who is not her husband. Here is an example of the court's clear interference with an arrangement which seemed to be in the best interests of the children.

These two cases are intended only to suggest the kinds of unstated judicial sex-role biases which influence decision making and which the Equal Rights Amendment should work toward eliminating. Certainly, in these cases, there was a need for greater attention to be focused on the needs of the children, and less emphasis placed on the behavior of the mother. The issue in neglect is the effect of parental behavior on the children, not on the court. One commentator has warned that neglect statutes

> sometimes appear to be a means of policing the poor, especially parents on public welfare, and other parents, often young, who do not conform either in dress, life-style, or child-rearing practices to dominant middle-class norms. Here the interests of the child become secondary to the desire to punish, thus subverting child protection, the basic philosophy behind the neglect laws.[128]

The Equal Rights Amendment should prohibit this use of the neglect statute as a tool to enforce conformity with stereotypic ideas of acceptable maternal behavior unless a direct relationship between such behavior and positive harm to the child is shown.

There is no doubt that children need and must have care. In addition, it is fairly obvious that, as society is presently structured, in most situations the child-bearer shoulders the burden of this care. With reference to this fact, the Equal Rights Amendment must focus attention on a comparison of the kinds of obligations imposed on both mothers and fathers, and also on the dimensions of the maternal duty of care thus imposed, with reference to the actual needs of children.

In an ongoing marriage, the arrangement is generally that the father is primarily responsible for support, and the mother has the obligation of care. The emergence of the women's liberation movement should increase the number of arrangements which reverse these roles. The ERA should not affect such intrafamily arrangements in either situation. The problem occurs when the family unit breaks up—either because the marital partners no longer wish to continue the relationship or because of outside interference—and the court is called upon

128. S. KATZ, *supra* note 119, at 65.

to intervene. Observation of the family court leads to the conclusion that enforcement of the support and neglect laws has been almost exclusively along the lines of traditional sex roles. The implication of this dichotomy is also significant. There is no doubt that enforcing the support laws against men mandates conformity to a certain role, as does enforcement of neglect laws in the case of women. But it must also be realized that most men would have jobs regardless of the fact that they have children to be supported; without children, however, few women would stay home and perform traditional child care services. After twenty years of such labor, a man may well have achieved position and security, while a woman may have little but her memories. For some women this may be adequate reward, but for those who are locked into the narrow confines of the maternal role because of a lack of meaningful alternatives, this is scant recompense.

Steele and Pollock,[129] in their study of parental child abuse, attribute abusiveness to the "deprivation of basic mothering" in the parents' own childhood.[130] They state, however, that

> we do not imply that our patients have lacked maternal attention. Usually, they have been the object of great attention. Their mothers have hovered over them involving themselves in all areas of the patient's life throughout the years.[131]

They go on to describe a situation wherein they interviewed an abusing parent together with her mother:

> Her mother would "take over," answer questions directed to the daughter, tell the daughter what to answer, indicate in many ways what she expected the daughter to do, and either overtly or implicitly criticize and belittle her, all without paying attention to what the daughter was thinking, feeling, or trying to do.[132]

And yet, when a mother is deprived of every other outlet and told—by society, by the court, or by her own interpretation of what she should do—to direct all her energy and attention to her child, it does not seem all that strange that she might be driven to inhabit her child's life to this extent. Thus, the narrowness of judicial interpretation of

129. Steele & Pollack, *A Psychiatric Study of Parents Who Abuse Infants and Small Children,* in THE BATTERED CHILD 103 (R. Helfer & C. Kempe eds. 1968).

130. *Id.* at 112.

131. *Id.*

132. *Id.*

appropriate behavior for mothers might, in fact, be prolonging the very problem that the courts are trying to solve.

Finally, it is important to realize that the very nature of the housewife role, with its boredom and frustration, may be an important element in the neglect cycle. Betty Friedan, who has documented the effect that being a housewife has on a woman, says: "It is urgent to understand how the very condition of being a housewife can create a sense of emptiness, nonexistence, nothingness, in women."[133] This seems closely related to the idea of the "mechanical breakdown," which Steele and Pollack contend is the distinguishing feature of neglect, and which is characterized by "giving up and abandoning efforts."[134]

Thus, by labelling it "correct" behavior for a mother to remain isolated with only her children for company, the court may, in fact, enforce the neglect pattern, rather than help to find a solution. The ERA probably would not help in situations where, because of socialization, a woman neglects her children, but it could be utilized as a tool to prevent the court from acting to perpetuate or enforce particular role behavior unless there is a clear showing of harm to the children.

III. Improvement Under ERA

Our previous discussion has pointed out many ways in which moral theories and prejudices have affected the law in its treatment of women in family court. It remains for us to suggest ways in which the ERA, assuming that it is ultimately ratified, may be used to challenge sexist attitudes which affect the interpretation or enforcement of the law. There would appear to be two basic avenues of approach: (1) to appeal discriminatory decisions; (2) to develop programs to prevent sexist decisions.

Any official decision which discriminates on the basis of sex and denies the protections guaranteed by the ERA should be appealed. There are serious problems, however, in *proving* that sex bias was a factor in the decision. In a few rare cases, explicit demonstrations of sexist bias may well be apparent. In most, however, statistical patterns of sexist results will be the only support for an allegation of

133. B. Friedan, *supra* note 1, at 293.

134. Steele & Pollack, *supra* note 129, at 113.

discrimination. In any case, this procedure will put the burden of proving bias on the complainant.

As a preventive measure, judges and administrators should take affirmative action to recognize and eliminate their biases.[135] The best way to eliminate obsolete attitudes and to promote the adoption of new perceptions of women's rights would be to establish training programs and procedures to ensure the application of non-sexist value judgments at each level of the decision-making process. These programs might be modeled on the sentencing institutes now attended by many judges. Satisfactory completion of these training and testing programs could be made a mandatory job requirement for persons counselling or making decisions affecting women.

In considering alternatives, family court should not be bound by traditional notions of family structure. Judges and administrators should be openminded to the development of varying types of "basic social units" (families),[136] in order to relieve some of the pressures

135. A 1970 study revealed that clinicians' concepts of a healthy mature man were essentially the same as that of a healthy mature adult. However, their concept of a healthy, mature woman was significantly different. The adult/male standard included adjectives such as active, independent, objective, logical, worldly skilled, ambitious, and unemotional. Healthy women were, by contrast, seen by the clinicians as being *more* submissive, easily influenced, emotional, conceited, excitable in minor crises, easily hurt; and *less* independent, adventurous, aggressive, competitive, objective, and enthusiastic about math and science, then either males or adults. Broverman, Broverman & Clarkson, *Sex-Role Stereotypes and Clinical Judgments of Mental Health*, 34 J. CONSULTING & CLIN. PSYCH. 1 (1970). The researchers concluded by saying:

> Acceptance of an adjustment notion of health, then, places women in the conflictual position of having to decide whether to exhibit those positive characteristics considered desirable for men and adults, and thus have their "feminity" questioned, that is, be deviant in terms of being a woman; or to behave in the prescribed feminine manner, accept second-class adult status, and possibly live a lie to boot.

Id. at 6. *See also* Rappaport, Payne & Steinmann, *Perceptual Differences Between Married and Single College Women for the Concepts of Self, Ideal Woman, and Man's Ideal Woman*, 32 J. MARRIAGE & FAMILY 441 (1970); Steinmann, *Female-Role Perception as a Factor in Counseling*, 34 J. NAT'L ASSOC. WOMEN DEANS & COUNSELORS 27 (1970); Steinmann & Fox, *Attitudes Toward Women's Family Role Among Black and White Undergraduates*, FAMILY COORDINATOR 363 (1970). The actual result is to restrict the career choices of women, and to affect their adjustment to the demands of marriage and/or family life. *See also* Brown, *supra* note 5, at 921 n.97 for references to extensive literature in the area of "harms caused by the law's current discrimination and the benefits which will flow from their elimination by the Equal Rights Amendment." *Id.*

136. For penetrating criticisms of the traditional nuclear family model see S. FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (rev. ed. 1971) (note especially a section in the concluding chapter entitled "The Slow Death of the Family" for a new feminist model). *See also* J. BERNARD, THE FUTURE OF MARRIAGE (1972); D. COOPER, THE DEATH OF THE FAMILY (1970).

operating in the modern nuclear family. These may include alternative life styles in the form of licensed group marriage, communal living, trial marriage, etc. Elimination of the concept of illegitimacy, and provision for creative, supportive care facilities to the homemaker and/or child rearer, in order to provide stability in a child's social and emotional development, are also recommended.

Certainly, for many people, the birth (or adoption) and rearing of a child is and will remain the most important creative fact of their lives. However, it must be realized that

> [u]ntil society reaches the point of determining the exact "formula" for molding "ideal" or "normal" citizens, and unless total uniformity among our citizens is desired, there does not appear to be any clear basis for preferring one particular form of child rearing over another and permitting intervention for deviation from that mode.[137]

The freedom of each person to choose satisfying roles and modes of behavior is a basic precept of our society. But if, through lack of workable alternatives, the child and parent are isolated and confined too closely together, the promise of fulfillment for each may be stifled in mutual frustrations.[138] Similarly, if a young girl's search for identity is short-circuited into an unchosen role of docility and domesticity, the harm may be incalculable. Obviously, many of these problems require more for their solution than the law itself can provide; but the law can play a vital role.

CONCLUSION

Change is a variable function of time. Change in the law is especially hard to predict since law is such a multi-faceted procedure. If we look at the factors which will create beneficial changes in the area of women's legal rights and responsibilities, we may conceive of them as either "change-promoting" or "change-resistant." Some of the change-promoting factors are the search among the young for new alternative life styles, the erosion of the cohesiveness of the typical nuclear family, the sharp increase in divorce, the appearance of a strong women's movement, and pressures from population specialists to decrease the birth rate.

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137. S. KATZ, *supra* note 119, at 64.

138. *See, e.g.*, testimony of Margaret Mead in NEW YORK CITY COMMISSION ON HUMAN RIGHTS, WOMEN'S ROLE IN CONTEMPORARY SOCIETY 175 (1972).

Arrayed against this are the change-resistant, strongly held social and moral beliefs governing the "proper nature of things":

> From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care, and training to their children during their early years.
>
> In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he [sic] made mothers.[139]

These notions affect the law not only through the legislatures, but also serve to retard change to the extent they are reflected in binding legal precedent, in the predilections of individual judges, and in the social agencies which so often shape the law's application to individual persons. If the ERA is ratified, it will become a most important factor in tipping the balance in favor of a new approach. Its power to shape that change will be considerable.

In this comment we have attempted to investigate the ways in which traditional sexist beliefs have affected women in three role situations and how the ERA may be used imaginatively to relieve conformity pressures in favor of individually chosen modes of fulfillment. In doing so we recognize the importance of balancing individual needs and desires with society's interests in ensuring social stability and optimal child development and welfare. The notion of civic responsibility, so essential to democracy, is implicit in this definition of social stability. The demands of good citizenship do function as valid restraints on individual activity. Our concern is not to promote normlessness, nor even rigid equality for its own sake; rather, it is to *insist* that where individuals are required to conform their conduct to socially approved norms, they should be judged or advised by persons who see them primarily as individuals, instead of as men or women.

By going beyond the initial premise of the unconstitutionality of sex-based classification to an assertion of the unconstitutionality of official perpetuation of sexist behavioral norms, we have sought to make the ERA function in one of the areas where sexism does the

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139. Testimony of Senator Sam Ervin in 1970 HEARINGS, *supra* note 9, at 4 (offered in support of his alternative wording for the ERA).

most damage, namely, in the area of attitudes. Even though these changes may not occur immediately, they are bound to come eventually.[140] The ERA may be only a beginning, but if we use it well, it may ultimately signal the end of sexism.

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140. Undoubtedly, new perceptions of woman's nature and of her sexual and/or family role, will gradually be reflected in legal decisions as a result of legislative and administrative reform in other areas of the law which may affect women or men unfairly. Examples of such laws are those regarding access to education and jobs, maternity and child care provisions, choice of name upon marriage, rights regarding choice of domicile, management of one's own business affairs, and equality in determining obligations of support, grounds for divorce, alimony, and custody of minor children.